No. 85-2079

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, et al.,
Petitioners,

VS.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE CARPENTERS SOUTHERN CALIFORNIA ADMINISTRATIVE CORPORATION

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QUESTION PRESENTED

Does a United States District Court have jurisdiction pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement where the employer's obligation arises from its duties under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5)?

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INTEREST OF AMICUS CURIAE

Carpenters Southern California Administrative Corporation ("CSCAC"), is a non-profit corporation organized under the laws of the State of California for the purpose of administering the Carpenters Health and Welfare Trust for Southern California, the Carpenters Pension Trust for Southern California, the 11 County Carpenters Vacation Savings and Holiday Plan, and the Carpenters Joint Apprenticeship and Training Committee Fund for Southern California ("Carpenters Trusts"). The

Carpenters Trusts are multiemployer employee benefit plans established pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 186(c)(5) and the Employee Retirement Income Security Act of 1974 ("ERISA") §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208.

The Carpenters Trusts were created by a collective bargaining and trust agreements between the Associated General Contractors of California, Inc., the Building Industry Association of Southern California Inc. and the Southern California Contractors Association, Inc. and the District Councils and Local Unions in the Eleven (11) Southern California Counties affiliated with the United Brotherhood of Carpenters and Joiners of America.

Among its various functions and duties, CSCAC monitors the compliance of over 8,000 signatory employers participating in the various multiemployer trusts which it administers. When necessary, CSCAC brings suit in both federal and state courts to enforce the provisions of the collective bargaining and trust agreements and to ensure that the appropriate fringe benefit contributions are timely paid by the participating signatory employers.

The question presented for review is of the utmost importance to the thousands of carpentry employees and their dependents who are the beneficiaries of the various employee benefit plans which CSCAC administers. Consequently, CSCAC has a vital interest in seeking review of the appellate court's decision. If that court's decision is left intact, CSCAC will be effectively hamstrung in its efforts to monitor and compel compliance with the obligations imposed on the employer in all post-termination, pre-impasse situations. If CSCAC is foreclosed from

bringing suit in the United States District Court to enforce post-termination, pre-impasse obligations and to collect delinquent fringe benefit contributions, the inevitable drain on trust assets could devastate the financial integrity of the Carpenters Trusts and cause incalculable harm to the beneficiaries of the trusts and their dependents.

Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The decision below raises issues of extreme significance. This brief will discuss how the legislative history and statutory scheme of ERISA, 29 U.S.C. §§ 1001-1461, as amended by MPPAA demonstrate that section 515 of ERISA encompasses actions brought by multiemployer employee benefit plans to collect delinquencies arising under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 515(a)(5).

This brief, also will focus on the inadequacy of the National Labor Relations Board (the "Board") as a forum for the collection of post-termination, pre-impasse fringe benefit contribution delinquencies.

ARGUMENT

1. Section 515 of ERISA Encompasses Legal Actions by Multiemployer Employee Benefit Plans to Collect Post-Termination, Pre-Impasse Delinquencies Arising Under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5).

The relationship between a multiemployer employee benefit plan and an employer is a complex one which, for

purposes herein, can be broken down into three basic time periods: (1) the period during which the employer is signatory to an extant collective bargaining agreement; (2) the post-termination, pre-impasse period; and (3) withdrawal.

Section 515 of ERISA, 29 U.S.C. § 1145 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

It is well settled that district courts have jurisdiction under section 502(a)(3) over violations of section 515 of ERISA, 29 U.S.C. § 1145 which occur during the period when an employer is signatory to an extant collective bargaining agreement. See *Laborers Health & Welfare Trust Fund v. Hess,* 594 F.Supp. 273, 278 (N.D. Cal. 1984).

It is equally settled that, under section 4212(a) of ERISA, 29 U.S.C. § 13929(a), district courts have jurisdiction over withdrawal liability. See *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund,* 789 F.2d 691 (9th Cir. 1986).

A review of the legislative history, statutory language and the underlying statutory scheme lead inevitably to the conclusion that Congress intended that district courts also have jurisdiction over delinquencies which accrue during the post-termination, pre-impasse period.

The MPPAA were enacted in response to Congressional concern over the continued financial stability of multiemployer employee benefit plans. See MPPAA sec. 3, 29 U.S.C. § 1001(a). See generally H. R. Rep. No. 869

(part I), 96th Cong. 2d Sess. (1980). Congress perceived that the failure of employers to timely pay their fringe benefit contributions, coupled with the conversion of simple collection actions brought by the trusts into lengthy, costly and complex litigation, was a very real threat to the financial future of the trust funds. To remedy this problem, section 515 was enacted to provide to the trusts an uncomplicated, unambiguous, federal cause of action for the collection of delinquent fringe benefits contributions.

Concurrently with the enactment of MPPAA, Congress enacted section 4212(a) of ERISA requiring that employers withdrawing from multiemployer employee benefit plans pay to the plans the unfunded vested liability attributable to their employees' participation in the plans. Section 515 of ERISA also acts as the enforcement mechanism for section 4212(a).

Sections 515 and 4212(a) were created in tandem as part of a comprehensive federal scheme designed to facilitate the continued growth and promote the financial stability of multiemployer employee benefit plans throughout the full scope of the relationship between the Trust Funds and the employer. Given the stated goals of Congress in enacting the MPPAA, the appellate court's attempt to carve out the post-termination, pre-impasse time frame and hand it exclusively to the NLRB for enforcement of the employers' obligations under section 8(a)(5) makes no sense.

There is no legislature history that supports the notion that Congress intended that the Trusts seek recovery of delinquent fringe benefit contributions in different forums simply because of the time frame in which the delinquencies arose. To the contrary, Congress intended to create *one* enforcement mechanism to give the Trusts a straightforward, unambiguous federal cause of action for

the collection of *any* delinquent fringe benefit contributions. The appellate court's rationale ignores the stated intent and frustrates the result envisioned by Congress.

Likewise, there is no practical sense in splitting the enforcement of delinquent fringe benefit contributions between the district courts and NLRB. The NLRB has no particular monopoly in expertise to determine when post-termination, pre-impasse obligation ceases. The district courts must make the very same analysis in withdrawal liability situations under section 515. As Congress determined that the district court's expertise was sufficient in a lawsuit under section 4212(a) pursuant to section 515 to determine when a post-termination, pre-impasse obligations under section 8(a)(5) ceased, it necessarily follows that the district court is a competent forum to make the very same analysis under section 515 for the purpose of collecting delinquent fringe benefit contributions arising subsequent to termination but prior to withdrawal.

2. The Board, While Providing an Adequate Forum for Resolving Labor-Management Disputes and Remedying Unfair Labor Practices, is a Wholly Inadequate Arena for the Collection of Delinquent Fringe Benefit Contributions.

Congress would not impose upon the trustees of a multiemployer trust fund a fiduciary duty to maintain the fiscal security of the trust fund without providing an available and adequate forum in which to proceed. See *Laborers Health and Welfare Trust Fund v. Kaufman & Broad,* 707 F.2d 412, 416 (9th Cir. 1983). Implicit in the appellate court's finding that section 515 of ERISA, 29 U.S.C. § 1145, does not provide for jurisdiction over actions seeking to recover post-termination, pre-impasse fringe benefit contribution delinquencies, is the conclu-

sion that the Board would provide the trust funds with an *adequate* forum in which to obtain relief. For a plethora of reasons, this underlying assumption relied upon by the appellate court is invalid. Accordingly, the appellate court's ultimate conclusion is fatally flawed.

First, there is no guarantee that the Board will choose to exercise jurisdiction over charges filed by a trust fund. Generally, the Board will only exercise jurisdiction if a non-retail employer meets the jurisdictional standards by directly and indirectly purchasing goods and services valued above $50,000 from outside the state. *Snowshoe Company,* 212 NLRB No. 29 (1974). Many employers bound to contribute to the various trusts administered by CSCAC would not meet the Board's jurisdictional standards. Many small construction contractors would be able to evade their obligations to make trust fund contributions as the Board would decline to exercise jurisdiction over them. Moreover, even when the employer meets the Board's jurisdictional standards, the Board is not required to exercise its jurisdiction. The Board has the discretion to refuse to entertain certain disputes. 29 U.S.C. § 164(c)(1) provides:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction over the standards prevailing upon August 1, 1959.

The Board has expressed a reluctance to be used as a collection agency for trust funds. In *Rapid Fur Dressing, Inc.*, 278 NLRB No. 126 (1986), the Board found that an employer who unilaterally ceased to make contractually required payments to a trust fund violated sections 8(a)(5) and (1) of the National Labor Relations Act ("NLRA"). In dissenting, Chairman Dotson stated, "it is an unwise policy for the Board, with its heavy workload, to serve as a monitor for contract compliance . . . ." In *Can-Do, Inc.*, 279 NLRB No. 108 (1986), Chairman Dotson reiterated his opposition to the Board "allowing itself to be used as a collection agency."

It is unlikely that a trust fund would find a receptive forum in the Board. Especially in light of the backlog of cases faced by the Board. In an article for the *Labor Law Journal,* Chairman Dotson wrote:

> As of [December] 1, 1983, the backlog (the cases on hand) was [1355] C cases . . . and [326] R cases . . . , representing the largest volume of cases in the agency's history.
>
> * * *
>
> Concurrent with the growing number of pending cases, the Board has issued fewer decisions and, I must report, has taken longer to issue them.

35 Lab. L.J. 5 (1984).[1]

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[1]The huge backlog of cases pending before the Board creates an additional burden for trust funds. The delay in collecting contributions by the Board would result in the loss of investment income that could be earned if contributions were quickly recovered. Participants and beneficiaries of the trust funds suffer by receiving lower benefits. Employers who make the required contributions will suffer by being required to pay increased contribution rates and the potential withdrawal liability of employers may increase.

Because of the backlog of cases before the Board, it may decide that collecting delinquent contributions for thousands of employers detracts its attention from what it perceives to be more significant matters.

If the Board refuses to be used as a collection agency or is unable to effectively handle the increased workload, the trust funds will be without a remedy. Should the Board refuse to issue complaints the trust funds will not be able to seek review by the courts. Therefore, there is no guarantee that trust funds will have an available forum to recover delinquent contributions owing after the expiration of a collective bargaining agreement.

Second, the Board's six-month Statute of Limitations, 29 U.S.C. § 160(b), is impractical and imposes an impossible burden upon the trust funds. In a typical unfair labor practice situation, both the charging and charged party will have first-hand knowledge of the underlying facts giving rise to the filing of the charge. However, in cases involving trust funds, such is not the case.

The Carpenters Trusts are not parties to the collective bargaining and trust agreements; they are simply the third-party beneficiaries of those agreements. Typically, the trust funds do not have a daily working relationship with either the Union or the employer. See *NLRB v. Amax Coal Company,* 453 U.S. 322 (1981); *Schneider Moving & Storage Company v. Robbins,* 466 U.S. 364 (1984). Consequently, the trust funds would rarely have any first-hand knowledge of the commission of an unfair labor practice by the employer.

A typical scenario will illuminate the trust funds' predicament: An employer opts to terminate his collective bargaining agreement, begins to negotiate with the Union and continues to submit fringe benefit contributions.

Notice of the termination is required to be sent to the Union, *not* the trust funds. Consequently, unless either the employer or the Union subsequently notifies the trust funds of the termination, the trust funds have no notice that the employer has terminated.

Since the employer continues to submit fringe benefit contributions to the trust funds, for all intents and purposes that employer would appear to be no different from an employer who had not terminated. Absent notice, the trust funds have no practical way of distinguishing between the two classes of employers. The six-month Statute of Limitations could run long before the trust funds learned of the termination of the collective bargaining agreement.

Assuming *arguendo* that the trust funds will always be notified of the termination of a collective bargaining agreement, the six-month Statute of Limitations would nevertheless impose an insurmountable obstacle to a trust fund. Typically, the only method the trust funds have at their disposal to verify an employer's compliance with the provisions of the collective bargaining agreement with respect to fringe benefit contributions, is through an audit of the employer's books and records. In the example above, as long as contributions were made the employer would appear to be complying with §§ 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1) and 158(a)(5). However, until an audit of the employer's books and records can be conducted, it cannot be accurately ascertained whether the employer is in compliance or has committed an unfair labor practice. Meanwhile, the clock of the Board's six-month Statute of Limitations is relentlessly ticking.

In order to adequately protect itself (and the beneficiaries) the trust funds would be forced to file an unfair

labor practice charge against every employer who has tendered a termination to the union, regardless of whether the employer appears to be properly paying the requisite fringe benefit contributions. Alternatively, the enormous expense of conducting a continuing audit of each terminating employer would have to be borne. Until such time as an audit can be conducted, the Carpenters Trusts cannot know whether an unfair labor practice has occurred.

To further compound the problem, negotiations can continue for months, and in some situations, years. Trust funds will be required to ascertain the status of countless negotiations. Every six months, the trust funds would be forced to file new unfair labor charges with the Board or continue monitoring the employer's records. Failure to do so could expose the trustees to a charge of neglection of their fiduciary duties. See *Kaufman & Broad, supra.*

If the appellate court's ruling is allowed to stand, the Board will be inundated, nationwide, with thousands of unfair labor practice charges filed by multiemployer trust funds, solely to protect against the running of the Board's six-month Statute of Limitations. As stated above, this would substantially increase the workload of an already overworked Board.

Third, there is a substantial difference in the remedies available to a trust fund before the Board or the courts. In the courts, a trust fund is entitled to recover the unpaid contributions, interest on the unpaid contributions, an amount equal to the interest on the unpaid contributions or liquidated damages provided for under the plan, and reasonable attorneys' fees and costs of action. 29 U.S.C. § 1132(g)(2). When Congress enacted ERISA it was aware of the losses a trust fund incurs when contributions are not paid in a timely fashion. The

trust fund loses the benefit of investment income plus incurs increased administrative costs in detecting and collecting delinquencies. Accordingly, Congress provided for a full array of available remedies.

The purpose of the NLRA, however, is remedial. *Wisconsin Department of Industry, Labor and Human Relations v. Gould,* 475 U.S. ____, 106 S.Ct. 1057, 1062 n. 5 (1986). The Board's make whole remedy would allow only for the recovery of unpaid contributions and would not include double interest or liquidated damages or attorneys' fees. Such a remedy would not fully compensate a trust fund for its loss of investment income or its increased administrative costs.

The NLRA's remedial philosophy poses a further problem for trust funds. Once an unfair labor practice charge has been filed, the investigation, issuance of a complaint, prosecution of the case and enforcement is conducted by the Board. 29 C.F.R. §§ 101.2, 101.4, 102 *et seq.* The trustees of the trust fund, who are charged with maintaining the fiscal integrity of the fund, have no control over the action. The Board could refuse to issue a complaint. Or the Board could agree to a settlement even over the objections of the trustees. 29 C.F.R. § 101.9(c). The Board has no fiduciary duty to the participants and beneficiaries of the trust fund. Therefore, if, in the Board's view, a settlement would effectuate the purpose of the NLRA a matter will be settled despite the loss to the trust funds.

Fourth, because the Board controls the investigation and prosecution of charges, trust funds will lose their ability to conduct audits. This Court, in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. ____, 105 S.Ct. 2833, 86 L.Ed. 2d

447 (1985), upheld the right of trustees to conduct audits and emphasized the importance of audits.

Most trust funds are experienced in the auditing of employer's books and records and have developed sophisticated in-house auditing programs or utilize auditing firms to verify an employer's compliance with the terms of the agreements. The Board lacks such expertise. It is impossible for a Board Agent, untrained and inexperienced in accounting principles, to conduct a thorough investigation. Consequently, many employers will be able to avoid liability simply because of the Board's lack of expertise and resources.

Fifth, the requirement imposed by the appellate court to file charges with the Board would require that a multiplicity of actions be brought by the trust funds. Suits to collect pre-termination delinquencies would be brought before the United States District Court. Post-termination, pre-impasse delinquencies would of necessity be brought before the Board. Congress could not have intended this result when it enacted the MPPAA seeking to insure a quick and inexpensive means for collecting delinquent contributions.

Post-liability suits to collect withdrawal liability would be brought before the United States District Court. Both pre-impasse delinquencies and withdrawal liability cases necessarily decide the issue of when and if impasse was reached. It is conceivable that the Board and the court may reach conflicting results. Although the appellate court in the instant case reasoned that the Board had the particular expertise to decide the perplexing issue as to when impasse was reached, the appellate court ignored the fact that the district court must make the same analysis in determining whether an employer has any withdrawal liability. As the issue is identical, it defies

logic to assert that in the one situation the district court possesses the expertise to resolve the issue, while in a second situation requiring the same analysis, the court does not possess the requisite expertise.

CONCLUSION

The decision of the court below limiting the bringing of an action to collect post-termination, pre-impasse fringe benefit contribution delinquencies to the Board (to the exclusion of the federal district courts) creates insurmountable obstacles preventing the trustees of multiemployer trust funds from the performance of their fiduciary duties. Additionally, the ruling below reaches a result which defies logic and opens the floodgates of litigation by demanding the needless filing of a multiplicity of actions in various forums to redress related wrongs. For the foregoing reasons, the Judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 9, 1987, I served the within Brief of Amicus Curiae in re: "Laborers Health and Welfare Trust Fund for Northern California vs Advanced Lightweight Concrete Co., Inc." in the United States Supreme Court, October Term 1985, No. 85-2079;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 9, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA